the fine of $3,000/- was manifestly excessive and that a fine should always be related to the means of the accused. The learned Judge also held in that case that the imposition of a fine beyond the appellant's means or six months' imprisonment in default of payment was tantamount to sentencing the appellant to six months' imprisonment without the option of a fine. Mr. Chandra therefore contended that in the circumstances of the present case the imposition of a fine of $3,000/- or, in default six months' imprisonment, was virtually tantamount to a peremptory sentence of six months imprisonment and was together with the 2½ years' imprisonment manifestly excessive (*Re Fong Ah Hee*).[2] Counsel also contended that the learned magistrate had failed to consider mitigating factors including the fact that the appellant had pleaded guilty and that the stolen car had been recovered. I agreed with learned counsel that if it was really necessary to impose a fine in addition to the custodial sentence, then the trial magistrate should have taken into consideration, *inter alia*, the financial circumstances of the appellant, the profit arising from the offence, the value of the subject matter and the amount of injury, if any, inflicted. (See *Rex* v. *Teo Woo Tin*).[3] In all the circumstances of the case I considered the sentence imposed was manifestly excessive and therefore altered it by setting aside the order of a fine of $3,000/- or, in default six months' imprisonment. The appellant therefore need only serve 2½ years' imprisonment to be followed by one year's police supervision.

Appeal allowed.

Solicitors: *K. Chandra & Co.*

ZAKARIA BIN MOHAMED ESA v. DATO ABDUL AZIZ BIN AHMAD & ORS.

[O.C.J. (Yusoff Mohamed J.) December 30, 1984]

[Johor Bahru – Civil Suit No. 106 of 1983]

Practice and Procedure – Striking out statement of claim – No reasonable cause of action – Scandalous or vexatious – Abuse of process of court – Anti-corruption officers – R.H.C. 1980, 0.18 r. 19 & 0.33 r.2 – Federal Constitution, art. 145(3) – Criminal Procedure Code (F.M.S. Cap.6), s. 109.

In this case the plaintiff sued the defendants for an injunction, damages and costs. His statement of claim states *inter alia* that the defendants are officers of the Badan Pencegah Rasuah (Anti-Corruption Agency), that the defendants abused their powers to commit tort against him that they were neither acting within the scope of their authority nor acting lawfully or in good faith, that they harassed, threatened, intimidated and defamed him in several ways and that the 1st defendant was unhappy over the plaintiff's investigation into two companies and as a result, the 1st defendant became hostile towards him. No defence had been filed at this stage.

The question in this application by the defendants is whether the whole statement of claim should be struck out under 0.18, r.19, R.H.C. 1980, as disclosing no reasonable cause of action, scandalous or vexatious or otherwise it was an abuse of the powers of court.

Held, dismissing the defendant's application: (1) the matters raised by both parties in their affidavits were mainly questions of fact to be decided at trial. The defendants' claim to immunity from suits was also a serious question of law which had to be decided at trial. The present court could not at this juncture usurp the function of a trial judge and deal with these issues summarily;

(2) the present pleading read as a whole and presuming all the allegations to be true was not a plain and obvious case to strike out as disclosing no reasonable cause of action. Nor were they scandalous or vexatious or an abuse of the process of the court on the grounds advanced by the learned Senior Federal Counsel.

Cases referred to:

(1) *Peck* v. *Russell* (1923) 4 F.M.S.L.R. 32, 34.
(2) *Hubbuck* v. *Wilkinson* [1899] 1 Q.B. 86, 91.
(3) *Parry-Jones* v. *Law Society & Ors.* [1968] 1 Ch. 195; [1969] 1 Ch. 1.
(4) *Asher & Ors.* v. *Secretary of State for the Environment & Anor.* [1974] 2 W.L.R. 466.
(5) *Thorne* v. *University of London* [1966] 2 W.L.R. 1080.
(6) *Blackburn* v. *Attorney-General* [1971] 2 All E.R. 1380.

CIVIL SUIT.

Subra Naicker for the plaintiff/respondent.

Datuk Hj. Abu Mansor bin Ali (Senior Federal Counsel) for the defendants/applicants.

Cur. Adv. Vult.

Yusoff Mohamed J. : The question in issue in this case is whether the whole Statement of Claim should be struck out under Order 18 Rule 19 of the Rules of the High Court 1980 as disclosing no reasonable cause of action, scandalous or vexatious or otherwise it is an abuse of the process of the Court.

First, no reasonable cause of action. In considering this Statement of Claim as disclosing no

reasonable cause of action, no evidence is admissible – see Order 18 Rule 19, paragraph (2). It is a settled rule that the pleading must be read as a whole, each paragraph must be viewed in relation with the others and cannot be viewed in isolation, and in *Peck* v. *Russell*[1] it was held there that the plaint and its documents alone should be considered and all the allegations in it should be assumed to be true.

The Statement of Claim states that both the plaintiff and the defendants are officers of the Badan Pencegah Rasuah (BPR). Paragraph 2 avers that the defendants abused their powers to commit tort against the plaintiff. Paragraph 3 avers that the defendants were neither acting within the scope of their authority nor acting lawfully or in good faith. Paragraph 4 avers that the defendants harassed, threatened, intimidated and defamed the plaintiff in several ways.

Paragraphs 5 and 6 set out details how the claim had arisen in that the 1st defendant was unhappy over the plaintiff's investigation into Syarikat Bakland Berhad and Dapat Sdn. Bhd. in Johor Bahru and as a result the 1st defendant became hostile towards him. Paragraphs 7 and 8 aver that the 1st defendant conspired and colluded with the other 4 defendants and unlawfully committed various acts of tort against the plaintiff. It also sets out particulars in 15 items of the defendants' alleged tortious act against him. In paragraph 9, the plaintiff claims for an injunction, damages and costs against the defendants. No Statement of Defence has been filed by the defendants at this stage.

The Learned Senior Federal Counsel on behalf of the defendants at the outset denied all the plaintiff's allegations as untrue and attribute them as irresponsible statements questioning the integrity of the defendants. Elsewhere in his submission, he also raised the question whether the plaintiff, being a person under police investigation could institute an action to stop such investigation. This application, he urged, raises the important issue of discretion exercisable by the Attorney-General under Article 145 (3) of the Federal Constitution, that is, the power to institute, conduct or discontinue any proceedings for an offence.

While repeating that *Peck* v. *Russell (supra)* lays down the rule that all allegations in the Statement of Claim are presumed to be true and the Court is not concerned at this stage of the proceeding whether those allegations are unfounded; the point of law raised by the Learned Senior Federal Counsel if it is considered sufficiently important, clearly requires serious discussion and the proper course open to the defendants would be to take an objection on the pleadings and the point set down for argument under Order 33, Rule 2, Rules of the High Court 1980 – see *Hubbuck* v. *Wilkinson*[2].

Nevertheless, on the face of the Writ it does not appear that the Attorney-General is made a party to the action so that the prayer in the Statement of Claim for injunction could be construed as to restrain him from taking proceedings against the plaintiff. It seems that the defendants are sued in their personal capacities and the prayer for an injunction necessarily refer to an order to restrain the defendants from continuing with the tortious acts alleged in the Statement of Claim.

Secondly, abuse of the process of Court – Section 109. The Learned Senior Federal Counsel further urged that the Court should not allow its process to be abused and contended that since the investigation against the plaintiff was conducted in accordance with section 109 of the Criminal Procedure Code, it is not open for the plaintiff to challenge this investigation.

Section 109 of the Criminal Procedure Code (FMS Cap.6) provides:-

> "109.(i) Any police officer not below the rank of Sergeant or any officer in charge of a police station may without the order of the Public Prosecutor exercise all or any of the special powers in relation to police investigations given by this Chapter in any seizable case.
>
> (ii) No proceeding of a police officer in any such case shall at any stage be called in question *on the ground that the case was one in which such officer was not empowered under this section* to exercise the special powers of police investigations given by this Chapter." (emphasis supplied).

Again, I would say that this is another point of law which should be taken for argument under Rule 2 of Order 33, whether the investigation against the plaintiff was conducted in accordance with the section or the question raised in the Statement of Claim was such ground as provided in sub-section (ii) of the section. It would be premature for me to decide this issue without proper argument.

The following authorities were cited by the Learned Senior Federal Counsel. Reading the headnotes on the facts and findings of each case, he argued that they are in support of his proposition that the Statement of Claim is an abuse of the

process of the Court. In my view, these cases are distinguishable on each set of facts from the present. They were decided on their own facts and are in no way analogous to this application. The cases are:-

Parry-Jones v. *Law Society & Ors.*[3]

The injunction sought there by a solicitor-trustee by way of writ to restrain the Law Society from having access to confidential information relating to any of his clients without express authority of each client.

Held: Indorsement on the writ disclosed no cause of action because the disclosure of such documents by the solicitor-trustee was necessary to ascertain compliance with the account rules of the Law Society.

This case is distinguished. The injunction sought here is to restrain defamation and harrassment which is justiciable.

Asher and Others v. *Secretary of State for the Environment & Anor.*[4]

This is not a case in point. There Megarry J. struck out the plaintiff's Statement of Claim as disclosing no reasonable cause of action against the District auditor because the plaintiff had deliberately defied the law in failing to implement the provisions of the Housing Finance Act 1972.

On Appeal, held that since the Secretary of State was the person to take action to see that the law was obeyed, his discretion directing extra-ordinary audit under section 236 of the Act was not to be questioned as long as he had acted in good faith which was not challenged.

Here the good faith of the officers purporting to exercise powers under section 109, C.P.C. was challenged. The facts are also not similar.

Thorne v. *University of London*[5]

The plaintiff's interlocutory application for leave to appeal was dismissed on the ground that all questions affecting the construction of the regulations of the University with respect to examinations and degrees were within the exclusive jurisdiction of the Visitor to the University and were not justiciable.

In that case the plaintiff had claimed damages against the University for negligently misjudging his examination paper and sought an order of mandamus commanding the defendant University to award him the grade justified.

It is subject to argument under Order 33 Rule 2 of the Rules of the High Court or at trial, yet to be decided whether the questions affecting the powers of investigation under section 109 of the Criminal Procedure Code in the present case is within the exclusive jurisdiction of the defendants and therefore not justiciable.

Blackburn v. *Attorney-General*[6]

This case decides on the treaty-making power of the Crown on entry into the Common Market.

The plaintiff's action seeking declarations that the signature of the Treaty of Rome by His Majesty's Government was in breach of law.

Held: The Statement of Claim disclosed no reasonable cause of action because His Majesty's Minister was exercising the prerogative of the Crown.

This case is no analogy to the present. It is not a case questioning the prerogative of His Majesty's Government.

Lastly, whether the action is scandalous, frivolous or vexatious and an abuse of the process of the Court. Every defendant filed an affidavit each in support of this application and the plaintiff filed an affidavit in reply.

The defendants' affidavits on the whole give their version of the events according to their views. Nothing stated therein refer to any averment in the Statement of Claim which is considered to be scandalous, frivolous or otherwise an abuse of the process of the Court. The affidavits are in fact the defendants' defences to the plaintiff's claim and their denial to the allegations made in the plaintiff's averments.

The gists of the defendants' affidavits are that the 1st defendant states that he came to know about the investigation against the plaintiff 8 days after it had started. On allegation of arrest of an officer of Badan Pencegah Rasuah published in *New Straits Times* of March 2, 1982, he said that he had made a denial of the allegation immediately and had it published in the *New Straits Times* on

March 3, 1982. He said the plaintiff's anxieties cannot be avoided. He admitted that the plaintiff's increment of salary was wrongly stopped by the 2nd Defendant but it was later fully restored by him.

The 2nd defendant states that he conducted investigations against the plaintiff under the powers given to him by law. He admitted that he had stopped the plaintiff's increment of salary which he later realised was not done according to the proper procedure.

While the remaining 3rd, 4th and 5th defendants all deposed that they were acting under lawful orders of the 2nd defendant, the 1st, 2nd and 3rd defendants also maintained that they are immune from suits. No grounds are given.

The plaintiff in his reply of course, gave different views of the matters deposed by the defendants.

The matters raised by both parties in their affidavits are mainly questions of fact to be decided at the trial. There are also propositions of law raised by the plaintiff whether publication in the newspapers on March 2, 1982 alleging his arrest is defamatory and whether the stoppage of his salary was done *bona fide* though the facts have been admitted. The defendants' claim to immunity from suits is also a serious question of law which has to be gone into at trial. I cannot at this juncture usurp the function of a trial judge and deal with these issues summarily.

In my view, the present pleading read as a whole and presuming all the allegations to be true is not a plain and obvious case to strike out as disclosing no reasonable cause of action. Nor are they scandalous or vexatious or an abuse of the process of the Court on the grounds advanced by the Learned Senior Federal Counsel. The application is dismissed with costs.

Application dismissed.

Solicitors : *Subra Naicker & Co.*

SYARIKAT KERJASAMA SERBAGUNA TUNAS MUDA SUNGAI ARA v. GHAZALI BIN IBRAHIM

[O.C.J. (Mohamed Dzaiddin J.) January 9 & 11, 1985]

[Penang – Civil Suit No. 230 of 1979]

Practice & Procedure – Order 14 application – Whether there was a triable defence – Circumstances under which court will allow application.

The plaintiff claimed that the defendant was a trespasser who wrongfully erected the unnumbered premises on part of the plaintiff's land. The defendant denied this in his statement of Defence of July 28, 1979. He averred that he constructed his premises on a portion of land which belonged to his mother. The same averment was repeated in the affidavit of the mother. She stated that she gave consent to the defendant to construct the premises on a portion of her land which she purchased from the plaintiff.

The facts revealed, however, that the land had not been subdivided. From the survey plan made by one Syarikat Ayob, it was found that the defendant's premises was constructed on part or portion of the plaintiff's land. There was nothing to indicate on the survey plan that the said premises was built on the portion which the defendant's mother had alleged to have been alienated to her by the plaintiff. The court also found that the defendant's mother was not the registered proprietor of any of the portion of land belonging to the plaintiff.

Held: (1) this is essentially a case where the triability of the issue depends upon evidence as opposed to law;

(2) from the facts and circumstances of the case as a whole, the court was satisfied that the defendant had failed to show a *bona fide* defence to the claim.

[*Editorial Note:* An appeal has been filed by the defendant against this decision in M.A. Rayuan Sivil No. 66 of 1985].

Case referred to:

(1) *Banque de Paris* v. *de Naray* [1984] 1 Lloyd's Rep. 23.

CIVIL SUIT.

Ghazi Ishak for the plaintiff.

Mohideen Abdul Kader for the defendant.

Cur. Adv. Vult.

Mohamed Daziddin J. : This is an application by the Plaintiff by way of Summons-in-Chambers for final judgment against the Defendant for an order that the Defendant do forthwith pull down and remove the unnumbered premises constructed adjacent to premises No. 17B Sungai Nibong Kecil, Pulau Pinang which stands on a portion of the Plaintiff's land known as Lot 1951 Mukim 12 Pulau Pinang and for damages and costs.